UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

JEVAN SNEAD, individually and on behalf of all others similarly situated,)

Plaintiff,)

v.) Civil No. 5:16-CV-1134-OLG

EOG RESOURCES, INC.,)

Defendant.)

ORDER

This case is before the Court on Plaintiff's motions for conditional certification (docket no. 5) and for judgment on the pleadings on Defendant's counterclaims for indemnification, breach of contract, and unjust enrichment (docket no. 14). The Court finds that both motions should be GRANTED.

Background

Plaintiff's complaint alleges that Defendant misclassified Plaintiff and other EOG Resources, Inc. (EOG) Logistics Coordinators as independent contractors and failed to pay them overtime required by the Fair Labor Standards Act (FLSA). Docket no. 5 at 6. Plaintiff seeks conditional certification of a class of current and former in-office logistics coordinators for EOG, which he anticipates will include 18 individuals in San Antonio and more than 40 individuals at other EOG offices. *Id.* at 19.

Defendant has asserted three counterclaims against Plaintiff. First, Defendant asserts a claim for indemnification, alleging that Plaintiff executed a Master Services Agreement (MSA) with Defendant under which Plaintiff "agreed to comply with the FLSA" and agreed to indemnify Defendant against any claim of FLSA violations. Docket no. 8 at 23, 26-27. Second, Defendant asserts a claim for breach of contract, alleging that Plaintiff is liable for any FLSA violation and that such violation would be in breach of Plaintiff's MSA with Defendant. *Id.* at 27. Third, Defendant asserts a claim for unjust enrichment, alleging that Plaintiff reaped "the benefits and advantages of providing services as [an] independent contractor[,]" including "freedom, flexibility, and tax advantages[,]" such that "[s]hould [Plaintiff] prevail in his claim, [Plaintiff] obtained these benefits by the taking of undue advantage." *Id.* at 27-28.

The Motion for Judgment on the Pleadings (docket no. 14)

The Court first addresses Plaintiff's motion seeking judgment on the pleadings. The standard for a motion seeking judgment on the pleadings under Fed. R. Civ. P. 12(c) is the same as for a motion to dismiss under Rule 12(b)(6): A claim is subject to dismissal unless it contains sufficient factual matter, accepted as true, to state a claim to relief that is "plausible on its face." *Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 318 (5th Cir. 2009); Fed. R. Civ. P. 12(h)(2).

Plaintiff argues that Defendant's counterclaims must be dismissed because employers may not seek indemnity from employees for FLSA violations, because agreements to make an employee responsible for FLSA compliance are contrary to the FLSA, because unjust enrichment is not an independent cause of action, and because Defendant's unjust enrichment claim makes no allegation of damages. Docket no. 14 at 3-7. Plaintiff further argues that counterclaims are impermissible in the context of FLSA actions. *Id.* at 7. In its reply, Defendant argues that the authorities Plaintiff relies upon preclude indemnification for FLSA violations from employees, but not from contractors; that the FLSA precludes employees, but not contractors, from assuming responsibility for FLSA compliance; that unjust enrichment is a viable cause of action; and that the possibility that Plaintiff retained unknown tax benefits by presenting himself as a contractor rather than an employee precludes dismissal of Defendant's unjust enrichment claim. Docket no. 14 at 5-10. Defendant further argues that its pleading that Plaintiff was an independent contractor must be accepted as true under the Rule 12(c) standard of review. *Id.* at 5.

The Court finds Defendant's arguments unpersuasive. First, Plaintiff's employment status is not conclusively established at this stage by Defendant's pleadings that he signed an MSA in which he "expressly agreed that he was an independent contractor[.]" Docket nos. 8 at 24; 17 at 5-6. Even in the context of a motion under Rule 12(c), a non-movant's statements of legal conclusion are not entitled to the presumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 680-81 (2009), and the ultimate question of Plaintiff's status as a contractor or employee—although it is "based on factual inferences drawn from historical facts"—is nonetheless "a legal conclusion." *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1045 (5th Cir. 1987); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1226 (5th Cir. 1990); *Mid-Continent Cas. Co. v. Davis*, 683 F.3d 651, 654 (5th Cir. 2012). Moreover, the facts from which this legal conclusion must be inferred go the economic reality of the nature of the working relationship, and "facile labels and subjective factors are only relevant to the extent that they mirror" that economic reality. *Brock*, 814 F.2d at 1044 (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)). At this stage, the Court will presume the truth of Defendant's pleadings that Plaintiff signed the MSA and agreed to be labeled as an independent contractor, but the fact of that agreement alone is not dispositive of the economic reality of the working relationship between the parties. The fact of the agreement, therefore, does not create a presumption as to the ultimate question of Plaintiff's status, a legal question whose fact-intensive and case-specific nature makes it ill-suited to summary resolution. *See, e.g.*, *Dalheim*, 918 F.2d at 1226; *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1542-43 (7th Cir. 1987) (Easterbrook, J., concurring).

Second, although the Court agrees with Defendants that counterclaims for indemnity and breach of contract may be asserted in a FLSA case against contractors in some circumstances, the Court nonetheless finds that Defendant has failed to plead viable counterclaims. As Defendant notes, Courts have permitted FLSA Defendants to assert contractual indemnity claims in some cases. For example, in *Itzep*, this Court found that the FLSA did not preempt a defendant-employer from asserting an indemnity claim against a co-employer. *Itzep v. Target Corp.*, No. SA-06-CA-568-XR, 2010 WL 2278349, at *24 (W.D. Tex. June 4, 2010). And, as Defendant notes, courts in other jurisdictions have held that indemnity counterclaims asserted against plaintiffs whose FLSA coverage is in question should not be dismissed at the pleading stage, in part because of the fact-intensive nature of determining FLSA coverage. *See, e.g.*, *Spellman v. Am. Eagle Express, Inc.*, 680 F. Supp. 2d 188 (D.D.C. 2010); *Costello v. BeavEx Inc.*, No. 12 C 7843, 2013 WL 2156052 (N.D. Ill. May 17, 2013); *but compare Itzep*, 2010 WL 2278349, at *23 ("the employer seeking indemnification, as an employer, [is] 'outside of the statute's intended protection, regardless of the status of the party from whom he seeks contribution.'") (quoting *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 143 (2d Cir. 1999).

Unlike *Itzep*, however, Defendant's indemnity counterclaim is directed not against a third party co-employer or supervisory employee, but against the very plaintiff whose FLSA coverage is outcome-determinative. *Compare Itzep*, 2010 WL 2278349, at *24; *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1264 (5th Cir. 1986). Additionally, Defendant's counterclaims are conditioned on a finding of FLSA liability against Defendant. Docket no. 8 at 26 (asserting indemnity claim "if EOG is held liable to Snead for unpaid overtime and any other monetary damages" and asserting contract claim "[i]n the event . . . the Court or a jury decides that EOG violated any laws as alleged by Snead"). This leaves two possible outcomes: Either (1) the evidence will show that Plaintiff was an independent contractor not covered by the FLSA, in which case there will be no FLSA recovery to activate Defendant's counterclaims; or (2) the evidence will show that Plaintiff was an employee with FLSA protections, in which case the FLSA will preempt Defendant's counterclaims. *Lozano v. W. Concrete Pumping, Inc.*, No. 1:15-CV-1192-RP, 2016 WL 4444907, at *5-*6 (W.D. Tex. Aug. 23, 2016). Defendant's counterclaims are thus subject to dismissal because they create no possibility that Defendant will "sustain recovery under some viable legal theory[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (internal quotation marks omitted); *In re Plywood Antitrust Litig.*, 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981).

Finally, in addition to the reasons set forth above, dismissal of Defendant's unjust enrichment claim is appropriate because Defendant has failed to allege any cognizable damage. The Court agrees with Defendant that the Texas Supreme Court has recognized unjust enrichment as a viable cause of action. *Heldenfels Bros. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992); *but cf. Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000) ("Generally speaking, when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory"). Defendant's unjust enrichment claim seeks to recover an unquantified—and likely unquantifiable—amount for the "freedom" and "flexibility" that Defendant alleges Plaintiff enjoyed by virtue of working as a contractor rather than an employee. Defendant also seeks compensation for "tax advantages" that it alleges Plaintiff enjoyed, arguing in its reply that "Snead may have claimed a tax credit for property used in his business"; "may have claimed a deduction for the use of his home for business purposes"; and "may have also deducted meals or entertainment if they were related to his business." Docket nos. 8 at 27; 17 at 10. This theory of recovery overlooks a fundamental requirement of unjust enrichment claims: that retention of the benefit by the party against whom recovery is sought be unjust to the party seeking recovery. *Heldenfels Bros. v. City of Corpus*

Christi, 832 S.W.2d 39, 41 (Tex. 1992); *Fun Time Centers, Inc. v. Cont'l Nat. Bank of Ft. Worth*, 517 S.W.2d 877, 884 (Tex. Civ. App. 1974, writ ref'd n.r.e.). The speculative possibility that Plaintiff may have received tax benefits as a contractor when he was actually an employee does not endow Defendant with standing to recover that tax windfall from Plaintiff.

For these reasons, the Court concludes that Plaintiff's motion for judgment on the pleadings on Defendant's counterclaims (docket no. 14) should be GRANTED.

The Motion for Conditional Certification (docket no. 5)

Plaintiff seeks conditional certification of a class of logistics coordinators employed by Defendant—workers who "provide support to Defendant's business by providing scheduling and other logistic services related to the transportation of fluids or solids to and from Defendant's rig locations." Docket no. 5 at 6. Specifically, Plaintiff seeks certification of a class of:

> All current and former similarly situated in-office logistics coordinators of EOG Resources Inc., under the Shared Services group performing service for EOG nationwide, regardless of what title they were initially or later given by Defendant; who:
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> Were paid a day rate for their services; and
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> Worked more than 40 hours in workweeks without being paid overtime premium wages for the hours worked over 40 pursuant to the federal Fair Labor Standards Act.

Id. at 7-8. Plaintiff has submitted proposed notice and consent forms and requests an order compelling Defendant to disclose the full names, last known addresses, and e-mail addresses for potential class members. *Id.* at 8. Plaintiff has also submitted a declaration and other evidence to show the existence of potential class members who are similarly situated in terms of their job duties, pay arrangement, and misclassification as independent contractors. *Id.* at 12-19; docket nos. 15-3 to 15-10.

In its opposition, Defendant argues that Plaintiff's evidence is insufficient to show the existence of other similarly situated class members, to show that the "economic realities" test can be applied in a similar manner across the putative class, or to show that any potential class members who do exist are interested in joining the putative class. Docket no. 13 at 6-7. Defendant further suggests that, even if Plaintiff succeeded in showing he was not an independent contractor, he would be exempt from the FLSA's overtime requirement as a highly compensated employee under 29 C.F.R. § 541.602(a). *Id.* at 10-11, 14. Defendant also argues that, in the event that conditional certification is granted, Plaintiff has not shown that disclosure of the phone numbers or e-mail addresses of potential class members is necessary. In that event that disclosure is ordered, Defendant requests that phone calls and e-mail notices be limited to putative class members whose mailed notices were returned as undeliverable, and requests that the Court order the parties to confer and agree on e-mail language and a phone script. *Id.* at 25. Finally, Defendants argue that Plaintiff's proposed class forms include an improper class definition, misstate the applicable period of limitations, inappropriately steer potential opt-in plaintiffs to representation by Plaintiff's counsel, and "fail to inform potential opt-ins of their obligations and risk of financial liability." *Id.* at 24-25.

Under 29 U.S.C. § 216(b), one or more employees may pursue an action in a representative capacity for "other employees similarly situated[,]" forming a collective action that affords plaintiffs "the advantage of lower individual costs to vindicate rights by the pooling of resources[,]" and that benefits the judicial system by "efficient resolution in one proceeding of common issues of law and fact." *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 496 (D.N.J. 2000) (quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)). This Court evaluates whether to certify a collective action under 29 U.S.C. § 216(b) at two junctures. At the first juncture, the "notice stage," the Court's assessment is usually based only on the pleadings and any affidavits that have been submitted. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213 (5th Cir. 1995), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

In light of the limited record available, the notice stage determination is made using "a fairly lenient standard, and typically results in 'conditional certification' of a representative class." *Mooney*, 54 F.3d at 1213-14; *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987); *Vallejo v. Ne. I.S.D.*, No. SA-12-CV-270-XR, 2012 WL 5183581, at *1 (W.D. Tex. Oct. 17, 2012). "It is not appropriate at [the notice stage] to require the plaintiffs to present evidence that would be required to survive a motion for summary judgment." *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 802 (S.D. Tex. 2010). While "most district courts agree that affidavits submitted at the notice stage of class certification need not be in a form admissible at trial[,]" *Pacheco v. Aldeeb*, No. 5:14-cv-121, 2015 WL 1509570, at *4 (W.D. Tex. Mar. 31, 2015), most courts require "that a declarant can demonstrate that the allegations in his declaration are based on personal knowledge[,]" which "can include inferences and opinions, so long as they are grounded in personal observation and experience." *McCloud v. McClinton Energy Grp., LLC*, No. 7:14-CV-120, 2015 WL 737024, at *4 & n.5 (W.D. Tex. Feb. 20, 2015) (quoting *United States v. Cantu*, 167 F.3d 198, 204 (5th Cir.1999)).

The Court is satisfied that Plaintiff has produced sufficient evidence to show that he has personal knowledge of potential opt-in plaintiffs who are similarly situated in terms of their job duties and payment provisions. Although Defendant disputes the sufficiency of Plaintiff's showing of personal knowledge regarding the job duties and pay provisions of potential opt-in plaintiffs, the parties' declarations in fact both describe a class of workers who perform similar duties and are paid in a similar fashion. *Compare, e.g.*, docket nos. 5-3 at ¶¶ 3-8 *and* 13-1 at ¶¶ 9, 13-15, 22, 25, 30. Defendant's declarant, Bobby Sanders, an EOG employee and "Shared

Services" manager, describes a cohort of individuals and entities contracted by EOG following an increased need for logistical management. Docket no. 13-1 at ¶¶ 8-9. According to Sanders, those putative contractors performed a similar set of duties, *id.* at ¶¶ 15, 18 ("[l]ogistics coordinators are tasked with answering phone calls from well sites when a certain type of service, equipment, or personnel is needed") and, with some exceptions,[1] were paid on a "day rate" basis, *id.* at ¶¶ 21, 30. This account is consistent with Plaintiff's declaration and the additional evidence submitted by Plaintiff, including a roster listing EOG Shared Services personnel and e-mail correspondence from an EOG Division Drilling Superintendent to EOG personnel instructing them on interfacing with "our EOG Shared Services department." Docket nos. 5-3 to 5-6. Notably, one of the key cases relied upon by Defendants for the proposition that Plaintiff has not made a sufficient showing of similarity in job duties and pay provisions, *Barnes v. Abandonment Consulting Servs., LLC*, is distinguishable because, in that case, the conditional certification request was submitted after the completion of discovery and on the eve of trial, rather than at the outset of the case. *Compare* 2013 WL 3884198, at *3-*4, *6 (S.D. Tex. July 26, 2013) (noting that "When a plaintiff . . . waits until after the close of discovery to request certification, the 'lenient' standard of the first step of *Lusardi* is no longer appropriate."). Taken together, the evidence from both Plaintiff and Defendant is sufficient to make the notice stage showing of the existence of potential opt-in plaintiffs who are similarly situated to the named Plaintiff in terms of their job duties and payment provisions.

The Court also agrees that, since Plaintiff has shown a "reasonable basis" to believe that other aggrieved individuals exist, it is not necessary at this stage for Plaintiff to also identify potential opt-in plaintiffs. *See Black v. Settlepou, P.C.*, No. 3:10-CV-1418-K, 2011 WL 609884, at *3 (N.D. Tex. Feb. 14, 2011) (argument that named plaintiff "is required to identify and obtain preliminary support from an unspecified numbers of potential class members in order to provide notice to other potential class members" "would seem to be putting the cart before the horse; there must only be a 'reasonable basis' to believe that other aggrieved individuals exist.") (quoting *Tolentino v. C & J Spec-Rent Servs. Inc.*, 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010)).

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[1] Any dissimilarity flowing from differing pay provisions, such as the unspecified number who were paid a weekly rate, is resolved by the proposed class definition, which limits the class to in-office logistics coordinators who "[w]ere paid a day rate for their services[.]" Docket no. 5 at 7-8.

The Court finds that the need to litigate the "economic reality" factors across the potential class is not fatal to conditional certification. As the parties both acknowledge, it is well-established that litigation of merits questions, including classification questions that require application of the "economic reality" factors, is inappropriate at this stage. Docket nos. 5 at 8; 13 at 19-20. Distinct from this merits determination, however, is the question of whether plaintiff and the putative class members are similarly situated for purposes of applying the economic realities test. *Christianson v. NewPark Drilling Fluids, LLC*, No. CIV.A. H-14-3235, 2015 WL 1268259, at *4 (S.D. Tex. Mar. 19, 2015). To date, the parties have submitted evidence that creates fact questions not only as to the merits question of how the economic realities test should apply, but also as to whether this test can be applied in a uniform fashion across the proposed class. For instance, Plaintiff's evidence tends to show that he and other logistics coordinators "were required to work at least 12 hours per day, seven days per week"; were provided with "a computer, an EOG e-mail address, a business card, an assigned office, a photo identification badge, and other miscellaneous office supplies"; had no financial investment in the facilities in which they worked; were not permitted to sub-contract their work out to other individuals absent prior approval from EOG; were subject to dismissal for reasons other than nonperformance of contract specifications; and were free to resign without notice or good cause and without incurring liability for unfinished work. Docket no. 5-3 at ¶¶ 14-18. Defendant, on the other hand, has produced evidence tending to show that, while some logistics coordinators contracted with Defendant directly, others were employees of LLCs, staffing services, or other business entities who contracted with Defendant; some were provided with a phone and phone plan to perform their work, while others were not; that not all logistics coordinators were paid the same amount or paid on a day rate basis; that not all logistics coordinators were required by Defendant to maintain their own insurance policies; and that EOG's utilization of logistics contractors would vary "based on different factors, including the type of well and level of well activity." Docket no. 13-1 at ¶¶ 12, 14, 19, 24, 27, 29-31. The Court finds that Plaintiff has made substantial allegations that are sufficient to make a notice-stage showing that Plaintiff and other logistics coordinators are similarly situated for the purpose of applying the economic reality test, and that, given the contrary evidence produced by Defendant, the ultimate determination of whether the economic realities test may be applied class-wide is better reserved for the decertification stage.

Finally, the Court finds that Plaintiff's request for disclosure of mailing addresses and e-mail addresses should be granted, but that disclosure of phone numbers is not necessary at this time. *See, e.g.*, *Jones v. JGC Dallas LLC*, No. 3:11-CV-2743-O, 2012 WL 6928101, at *5 n.9 (N.D. Tex. Nov. 29, 2012), *report and recommendation adopted*, No. 3:11-CV-2743-O, 2013 WL 271665 (N.D. Tex. Jan. 23, 2013); *Castillo v. Hernandez*, No. EP-10-CV-247-KC, 2010 WL 4595811, at *7 (W.D. Tex. Nov. 4, 2010). Plaintiff may seek discovery of additional contact information, including phone numbers, for potential class members whose mailed notices are returned as undeliverable and who cannot be reached by e-mail. *Garcia v. TWC Admin., LLC*, No. SA:14-CV-985-DAE, 2015 WL 1737932, at *5 (W.D. Tex. Apr. 16, 2015). The Court finds that the parties should confer to develop e-mail language and to resolve any disputes regarding the propriety of proposed class notice and consent forms.

Conclusion

It is therefore ORDERED that Plaintiff's motion for judgment on the pleadings on Defendant's counterclaims (docket no. 14) is GRANTED, and Plaintiff's motion for conditional certification (docket no. 5) is GRANTED AS FOLLOWS:

It is further ORDERED that the Court certifies creation of the following class:

> All current and former similarly situated in-office logistics coordinators of EOG Resources, Inc., under the Shared Services group performing service for EOG nationwide, regardless of what title they were initially or later given by Defendant; who:
>
> Were paid a day rate for their services; and
>
> Worked more than 40 hours in workweeks without being paid overtime premium wages for the hours worked over 40 pursuant to the federal Fair Labor Standards Act.

It is further ORDERED that, no later than 10 days from the date of this Order, Defendant shall produce to Plaintiff's counsel the full names, last-known addresses, and e-mail addresses for all class members, in both a paper format and an electronic format accessible by the Microsoft Office Suite; and

The parties shall confer to resolve any dispute regarding the content of the notice and consent forms proposed by Plaintiff, and to develop e-mail notice language, and, no later than 10 days from the date of this Order, the parties shall submit agreed notice, consent form, and e-mail language to the Court, or, if the parties are unable to agree, submit separate proposed notice, consent form, and e-mail language for the Court's review.

SIGNED this 14 day of February, 2017.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE